FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 217

E. F. HORNER,

Petitioner,

vs.

THE COUNTY OF WINNEBAGO AND A. R. CARTER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, SECOND DISTRICT, OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Appellate Court, Second District, of the State of Illinois, is reported at 332 Ill. App. 217; 74 N. E. (2nd) 728.

(It is presumed, although not set forth *in haec verba* in the abstract of record, that the opinion appears in the transcript of record as cited by the abstract of record. (Appellate Court Record 2, Abst. 16, and Supreme Court Record 2, Abst. 17.))

JURISDICTION.

The jurisdiction of this court is invoked by petitioner under Sec. 237 (b) of the Judicial Code. (Petition, 3.)

But the record presents several preliminary questions of jurisdiction and respondent, therefore, presents facts, authority and argument, obviating this court taking jurisdiction:

I.

Petitioner has not complied with United States Supreme Court Rule 38, Sec. 2, in that: (a) he has not disclosed the basis upon which it is contended this court has jurisdiction; (b) he has not specified the stage in the proceedings in the lower courts that a federal question was raised (Rule 12); (c) he has not set forth the manner of raising a federal question (Rule 12); (d) he has not set forth the way in which they were passed upon by the court (Rule 12); he has not set forth pertinent quotations of specific portions of the record as will support the assertion that the rulings were of a nature to confer jurisdiction in this court (Rule 12); but on the contrary, petitioner has made mere bland allegations of jurisdiction. (Petition, 3, 4.)

> "The decisions of this court not only have repeatedly held that a federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice." *Louisville, etc., R. Co.* v. *Woodford* (Ky. 1915) 235 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202.

Petitioner has not shown as required by Rule 38, Sec. 5a, that a state court has decided a question of federal substance not therefore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court.

Petitioner has not even specified a question of federal substance conferring jurisdiction of this court (Petition, 3, 4) let alone not showing it was not theretofore decided by this court, and, in contravention of the alternative of the above rule, has cited no federal case!

> "Upon application to this court for review of the judgment of a state court it is the petitioners burden to show affirmatively that we have jurisdiction." *Gorman* v. *Washington University*, 62 S. Ct. 962, 316 U. S. 98-101; 85 L. ed. 1300.
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> "• • • it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." *Southwestern Bell Teleph. Co.* v. *Oklahoma*, 303 U. S. 206, 212, 213; 82 L. ed. 751, 755. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U. S. 293, 295, 297, 35 L. ed. 193-195, 11 S. Ct. 528; *Whitney* v. *California*, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1099, 1100, 47 S. Ct. 641; *Lynch* v. *New York*, 293 U. S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16.

Unless petitioner has had printed in the transcript of record the opinion of the court below he has not complied with Rule 38, Sec. 7. See opinions below. (Resp. Brief, 1.) (Not abstracted.)

II.

Because petitioner has not abstracted the opinion of the Appellate Court, Second District, of the State of Illinois, as a matter of convenience to this court, we repeat certain excerpts (*Horner* v. *County of Winnebago*, 332 Ill. App. 217, 221, 74 N. E. (2nd) 728):

> "There are other points raised by the appellant, which we need not discuss. Whether the suit brought by appellant was *res adjudicata*, or whether the plaintiff had lost title to the premises, we do not decide, as we are satisfied the court was correct in sustaining the motion to dismiss the suit, because the Statute of Limitations was applicable. The judgment of the trial court is hereby affirmed.
>
> Judgment affirmed."

Obviously, then, the decision of the state court was based on an interpretation of the State Statute of Limitations.

> "Substantially conclusive effect is given to State Court decisions upon the construction of state statutes." *Gormley* v. *Clark*, 134 U. S. 338, 350, 33 L. Ed. 909, 913. *Ridings* v. *Johnson*, 128 U. S. 212; *Bacon* v. *Northwestern M. L. Ins. Co.*, 131 U. S. 258.
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> "Where the State Court based its judgment, not on a law raising a federal question, but on an independent ground, this court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one." *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; 32 L. ed. 125.
>
> "Inasmuch as one of the defenses called for the construction and application of a State Statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the highest court of the State. *Gormley* v. *Clark*, 134 U. S. 338, 348." *Johnson* v. *Risk*, 137 U. S. 300, 309, 34 L. ed. 683, 686.
>
> "Even though a federal question was present, where a defense is distinctly made, resting on local statutes, this Court should not, in order to reach a federal ques-

tion, resort to critical conjecture as to the action of the court in the disposition of such defense." (Statute of Limitations) *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686.

As the decision of the State Court rested, and may rest on an adequate non federal ground—the Illinois Statute of Limitations—the petition should be denied. *Richardson Machinery Co.* v. *Scott*, 276 Sup. Ct. Rep. 128, 133, 72 L. ed. 497, 500.

III.

Although petitioner has alleged (Petition, 3) that "federal questions sought to be reviewed were raised in the pleadings in the trial court and *in effect* by the assignment of errors and *argument;* and the petition for rehearing in the Appellate Court" he has not specified (Rule 12) what pleading raised the question; nor has the petitioner included in the record an assignment of errors, argument or petition for rehearing in the Appellate Court.

> "Jurisdiction (of the Supreme Court of the United States) cannot be founded on surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." *Lynch* v. *New York ex rel Pierson*, 293 U. S. 52, 54, 79 L. Ed. 191, 193.
>
> "Attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it. *Herndon* v. *Georgia*, 295 U. S. 441-445, 79 L. ed. p. 1532-33; *Texas & P. R. Co.* v. *Southern P. Co.*, 137 U. S. 48, 54, 34, L. ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder*, 149 U. S. 580, 585, 37 L. ed. 856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 64 L. ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 48 L. ed. 382, 387, 388, 44 S. Ct. 197, and cases cited."

Further, even though for the purpose of argument, it be considered that a federal question was raised, as the opinion of the Appellate Court of Illinois decided the cause on the Illinois Statute of Limitations, this court has repeatedly refused to take jurisdiction under such conditions.

> "Where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here." *Flournoy* v. *Wiener*, 321 U. S. 253-275, 88 L. ed. 708, 714. *Berea College* v. *Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 163, 164, 61 L. ed. 644, 648, 649, 37 S. Ct. 318; *Lynch* v. *New York*, 293 U. S. 52, 54, 55, 79 L. ed. 191-193, 55 S. Ct. 16; *Fox Film Co.* v. *Muller*, 296 U. S. 207, 210, 211, 80 L. ed. 158-160, 56 S. Ct. 183.
>
> "As the case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this Court has no jurisdiction." *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297, 35 L. Ed. 193-195.

IV.

Petitioner under the heading "Jurisdiction" (Petition, 3) has set forth an argument, relative to the motion to dismiss, unsupported by any authority, which presents no federal question and which patently does not go to the question of jurisdiction.

Because there inserted in the petition, we beg the indulgence of the court in answering it under petitioner's designation "Jurisdiction."

> "Under the provisions of the Civil Practice Act a motion to dismiss takes the place of a demurrer as formerly employed. (Sec. 45, par. 169, ch. 110, Civil Practice Act, Ill. Rec. Stat. 1937 [Jones Ill. Stats. Ann. 104.045].) It does not admit conclusions or inferences

drawn by the pleader (*Lietzman* v. *Radio Station W. C. F. L.*, 282 Ill. App. 203, 208), and under the authorities of this State pleadings are to be construed strictly against the plaintiff." *Klein* v. *Chicago Title & Trust Co.*, 295 Ill. App. 208, 216.

"A demurrer involves only such facts as are alleged in the pleading demurred to and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof. (*Wood* v. *Papendick*, 268 Ill. 383.) In considering such questions the averments of the pleas must be construed most strongly against the pleader. (*Kelleher* v. *Chicago City Railway Co.*, 256 Ill. 454; *People* v. *Lanham*, 189 *id.* 326.) *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 142.

"All facts material to the issue that are well pleaded are to be taken as admitted *for the purpose of the motion to dismiss.*" (*DePauw University* v. *United Elec. Coal Co.*, 299 Ill. App. 339, 346.

V.

Further, petitioner's argument for the jurisdiction of this court is obviously paradoxical for in Paragraph 4 (Petition 3) he alleges that facts well pleaded are admitted by a motion to dismiss for the purpose of said motion, but in Paragraph 5 (Petition, 3) he alleges *disputed* questions of fact were involved. As a matter of fact, there were no disputed questions of fact involved as the opinion of the Appellate Court (Resp. Brief, 4) shows that the cause was decided on the application of the Ill. Statute of Limitations and the affidavits referred to by petitioner (Petition, 3) raise the question of *res adjudicata* (Rec. 18-19, Abst. 11, 12) and whether plaintiff had lost title to the premises through prior foreclosure proceedings. (Rec. 20, Abst. 12, 13.)

Petitioner has failed to point out a federal question involved.

QUESTION PRESENTED.

There is only one question presented by the petition: Where a state court has decided a matter based on the application of a local statute, will this court take jurisdiction where no federal question appears?

ARGUMENT.

A review on writ of certiorari is not a matter of right. Rule 38, Sec. 5.

Although respondent has shown conclusively that petitioner has no right to a writ of certiorari based purely on petitioner's neglect to show a basis for this court to assume jurisdiction, as he has alleged jurisdiction, we must, of necessity, answer his argument.

Petitioner contends: (A) the state courts erred in deciding that the Statute of Limitations applied to the cause of action; (B) the state courts erred in not submitting the case to a jury because disputed facts were involved; and (C) the Appellate Court overlooked the case of *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 244.

A. This argument with respect to jurisdiction has been answered. (Resp. Brief, 2, 3, 4, 5, 6, 7.)

However, in addition thereto we direct the Court's attention to decisions supporting the application of the Statute of Limitations.

Actions to recover damages for a seizure or taking of real property must be instigated within five years of the alleged seizure or taking.

Monarch Refrigerating Co. v. *Chicago*, 328 Ill. App. 546.

Schlosser v. *Sanitary District*, 299 Ill. 77.

Wheeler v. *Sanitary District*, 270 Ill. 461.

Shaw v. *Sanitary District*, 267 Ill. 216.

North Shore Street Railway Co. v. *Payne*, 192 Ill. 239.

Merodosia Lake District v. *Sanitary District*, 268 Ill. App. 93.

Where a permanent structure, such as a highway, legally authorized is built, in the absence of an allegation of improper or negligent construction, the act is not a continuing trespass, but all damage past, present and future are sustained when the structure is built and its operation begun and recovery must be in a single unit, and the statute of limitations begins to run on the completion of the structure.

Monarch Refrigerating Co. v. *Chicago*, 328 Ill. App. 546.

Schlosser v. *Sanitary District*, 299 Ill. 77.

Bernhardt v. *B. & O. Southwestern R. R. Co.*, 165 Ill. App. 408, 410.

Merodosia Lake District v. *Sanitary District*, 268 Ill. App. 93.

Christie v. *Sanitary District*, 256 Ill. App. 63.

North Shore Street Railway Co. v. *Payne*, 192 Ill. 239.

C. & E. I. R. R. v. *Loeb*, 118 Ill. 203.

Central R. R. Co. v. *Ferrell*, 108 Ill. App. 659, 667.

The complaint, in all counts, alleges a certain trespass in 1930. (Abst. 1-6.) Additional allegations are that in 1930 the direction of a public road, previously used for over sixty years, was altered by the defendants so as to pass over and across plaintiff's property, thereby committing a trespass. Petitioner is bound by his complaint. A permanent structure was built and it follows as a matter of law that if any trespass was committed as alleged, it occurred in 1930 and as no allegations of improper construction or operation were made, the statute of limitations begins to run upon completion of the structure (*Schlosser* v. *Sanitary District*, 299 Ill. 77; *North Shore Street Railway Co.* v. *Payne*, 192 Ill. 239).

By the additional allegations of alteration and change of grade and level, which plaintiff alleges occurred in the fall of 1930, the plaintiff places himself squarely within the rule laid down in the case of *Monarch Refrigerating Co.* v. *Chicago*, 328 Ill. App. 546. The court there held that the suit should have been brought within five years from the time the grades and streets had been changed and opened to traffic. The Supreme Court of Illinois denied leave to appeal in that case, 331 Ill. App. XIV.

B. There were no disputed facts, as on a motion to dismiss all facts well pleaded or to be taken as admitted *for the purpose of the motion.*

DePauw University v. *United Elec. Coal Co.*, 299 Ill. App. 339, 346.

We refer to and reiterate IV and V of Respondent's Brief (pp. 6, 7).

C. Petitioner admits that the case of *Lake Shore Building Co.* v. *City of Chicago*, 207 Ill. App. 224 was cited in his brief to the Appellate Court of Illinois. (Petition, 13.) In fact, it was again submitted and argued in petitioner's petition for rehearing in the Appellate Court which was denied. (Appellate Court Record 5, Abst. 16.)

Suffice it to say that not only does this not present a federal question, but it does not obviate the rule that "substantially conclusive effect is given to state court decisions upon the construction of state statutes." *Gormley* v. *Clark*, 134 U. S. 338, 350, 33 L. ed. 909, 913.

The Appellate Court of Illinois based its decision on the application of the Statute of Limitations. (Resp. Brief, 4.)

Conclusion.

We submit that petitioner has failed to show jurisdiction of this court and if any right of action accrued to petitioner, it accrued in the fall of 1930, and as the action was started August 3, 1945 (Rec. 2-8, Abst. 1) the Statute of Limitations of the State of Illinois applied and the judgment of the Appellate Court, Second District, was correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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